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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 381.

CHARLES BOWN AND LEANDER L. ORMSBY,
PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING.

BRIEF FOR PLAINTIFFS IN ERROR.

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(19,851.)

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PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This appeal involves the validity or constitutionality of the following sections of the statutes of the State of Idaho:

"SECTION 1210. It is not lawful for any person owning or having charge of the sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling-house of the owner or owners of said possessory claim.

"SECTION 1211. The owner or agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Under the provisions of the statute the defendant in error, Enos C. Walling, commenced his action in the probate court of Elmore county against the plaintiffs in error, alleging violation of said sections of the statute in the grazing of sheep, and claiming damages in the amount of $200. The pleadings were afterwards amended, and, as the issues were finally presented, directly presented the sole question of the constitutionality or validity of said sections of the statute above referred to. The district court found in favor of the plaintiff (defendant in error). The case was appealed to the district court, where judgment was again entered in favor of the plaintiff. The cause afterwards went to the supreme court, and the judgment of the lower court was affirmed. Petition for rehearing was presented and denied (Transcript, pages 15, 16, 17, 18, and 19). Writ of error has been allowed to the supreme court of the State of Idaho, and, as will be observed from the assignments of error, the only matters presented are those relating to the validity or unconstitutionality of the sections of the statute above quoted.

ASSIGNMENTS OF ERROR.

We assign as errors of the supreme court of the State of Idaho—

First. That the court erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action is based, to wit, sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional, in that they are in violation of article 14 of the amendments of the Constitution of the United States, in that said statutes deprive the plaintiffs in error of their property without due process of law.

Second. That said statutes of the State of Idaho upon which the cause of action is based are invalid and unconsti-

tutional, in that they are in violation of article 14 of the amendments of the Constitution of the United States, as they deny to the plaintiffs in error the equal protection of the law.

Third. That said sections of the statute above referred to are invalid and unconstitutional, in that they abridge the privileges and immunities of citizens or of the plaintiffs in error as guaranteed by the fourteenth amendment of the Federal Constitution.

Fourth. That the supreme court would not have rendered its decision without deciding against the claim of the plaintiffs in error to the effect that said sections of the statute are unconstitutional.

Fifth. That the supreme court erred in holding that the plaintiff in said action was entitled to recover as damages or as a penalty the value of the grasses growing upon the public domain and alleged to have been eaten and destroyed by the sheep of plaintiffs in error, and that by so holding the plaintiffs in error were deprived of their property without due process of law and denied equal protection of the law.

Sixth. That said sections of the statute, 1210 and 1211, unlawfully discriminate between citizens engaged in sheep grazing on the public domain and those engaged in grazing other classes of stock upon public land.

ARGUMENT.

This is a peculiar and extraordinary statute. We have not been able to find its like, either in letter or spirit, elsewhere. It remained upon our statute books from 1875 until 1901 practically a dead letter, as no actions were ever had under the same. It carries upon its face an arbitrary discrimination against a legitimate industry. It has been sustained by our court (Judge Stockslager dissenting) upon the theory that it is within the police power of the State. If it be within the police power of the State, it seems difficult to foretell how far the State legislature would be permitted to go in its fanciful and arbitrary discriminations against any legitimate industry. It will be observed, too, that in sustaining this law the State court has held that as an element of damages the complaining party may recover the value of the grass growing upon the public domain and within two miles of a residence which may have been eaten or destroyed by sheep, although this grass unquestionably belongs to the public or the Government. We call attention to these decisions of the supreme court of the State of Idaho construing this statute and upholding it. By reference to these opinions it will be seen that the court has gone to the full extent of holding the act constitutional and given full effect and scope to its object and purpose. Under the holdings of the court the man who owns sheep may not go upon the public domain within two miles of any one's house, although a man owning any other kind of stock may graze up to his door. Under the holdings of the court if a man's sheep eat the grass from the public domain he is liable to his neighbor within two miles for the value thereof, although if the horseman or the cattleman destroys it he is not liable to any one for the value thereof.

Sweet *vs.* Ballentyne, 8 Idaho, 431.
Walling *vs.* Bown *et al.*, 72 Pac., 960.
Phipps *vs.* Grover, 75 Pac., 64.
Walling *vs.* Bown, 76 Pac., 318.
Spencer *vs.* Morgan, 79 Pac., 459.

Police Power.

Does the act in question come within the police power of the State? We may concede, as was said by our supreme court in the case of Seifers *vs.* Johnson (7 Idaho, 798): "The police power of the State is very great." Yet there are certain well-defined limitations which attach even to the exercise of this power, some of which, it seems to us, are manifestly violated by this statute. This power is not subject, perhaps, to any definite or exact definition. As was said by Justice Miller:

> "This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it rests the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property."
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> Slaughter-house Cases, 16 Wallace, 32.

It should be borne in mind in the first instance that this statute is dealing with an industry recognized as a legitimate industry. Under the laws of the State sheep-raising and sheep-grazing are not as yet criminal *per se*, and any law resting upon the police power of the State and depending for its validity upon such power must distinguish at all times in its interposition or interference between doing things which are criminal *per se* and industries which are recognized as rightful and important industries of the State, constituting a basis for legitimate wealth within the State. The State may go to any limit almost in dealing with persons when they are doing things which are a nuisance *per se* or pursuing avocations which are hurtful or criminal *per se*, but the law must stop on the hither side of the destruction of property or unnecessarily interfering with the pursuit of an industry unless the destruction or interference is absolutely essential to the peace, health, and morals of the com-

munity, and based upon real and actual distinctions and not upon arbitrary or fanciful distinctions. If a law in making these classifications and drawing these distinctions is based upon no well-defined distinctions or differences as a matter of fact, it will not be construed as a valid law or within the police power of the State. In other words, any distinctions in classifications which are made with reference to property or different industries or in placing limitations upon the pursuit of industries must be founded upon real distinctions and differences existing in fact. Burdens imposed upon legitimate and rightful industries and interfering with the full enjoyment of property or denying to certain people privileges which belong to others cannot be had except as a result of real distinctions or differences and such as are well founded in fact. As said by Justice Brewer in the case below:

"But it is said that it is not within the scope of the 14th amendment to withhold from the States the power of classification and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While as a general proposition this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subject to the payment of attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subject or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed *and can never be made arbitrarily and without such a basis.* When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely *personal and arbitrary power.* No duty rests more imperatively upon courts than the enforcement of those constitutional provisions intended to

secure that equality of rights which is the foundation of their government."

Gulf, Col & S. F. Ry. Co. *vs.* Ellis, 165 U. S., 150.

In this connection we call particular attention also to the following language of the Supreme Court:

"Though the law itself be fair upon its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo *vs.* Hopkins, 118 U. S., 220.

"To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interest of the public generally as distinguished from those of a particular class requires such interference, and second, that the means are reasonable and necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive but is subject to the supervision of the courts."

Lawton *vs.* Steele, 152 U. S., 133.

Mr. Cooley says:

"The doubt might also arise whether the regulation made for any one class of citizens entirely arbitrary in its character and restricting their rights, privileges or legal capacities in a manner before unknown to the law would be sustained. Distinctions in this respect should be based upon some reason which renders them important, like the one of capacities in infants and insane persons. But if the legislature should undertake to provide that persons following the same specified lawful trade or employment should not have capacity to * * * *make such use of the property as was permissible to others* it can scarcely be doubted that the act would transcend the due bounds of legislative power

even if it did not come with the conflict of an express constitutional provision. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness."

Cooley, Constitutional Limitations, page 391, 1 ed.
People *vs.* Gilson, 109 N. Y., 389.

In the case below there was involved a statute with reference to furnishing water for tenement houses, and the language used by Judge Peckham seems appropriate here:

"The act must be sustained, if at all, as an exercise of the police power of the State. It has frequently been said that it is difficult to give an exact definition which shall properly limit and describe such power which must be exercised subject to the provisions of both Federal and State constitution, and the law passed must tend in a degree that is perceptible and clear toward the preservation of the lives, the health or the morals or welfare of the community. All acts must tend in some appreciable or clear way toward the accomplishment of some one of the purposes which the legislature has the right to accomplish under the exercise of police power. It must not be exercised ostensibly in favor of the promotion of some such object while it really is an evasion thereof and for distinct and totally different purposes."

Health Department *vs.* Rector, 145 N. Y., 32.

In the case below it is said, in speaking of the fourteenth amendment, that it was intended "not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than laid upon others in the same calling and condition."

Barbier *vs.* Connelly, 113 U. S., 27.

Justice Stockslager in the dissenting opinion of Sweet *vs.* Ballentyne, 8 Idaho, 431, said:

"It has never been held and it would be not only new but a dangerous precedent to hold that under the pretense of police regulation you could give to one citizen an advantage over another in the mere matter of the use of the public domain or in the matter of general privileges and advantages."

"If a statute purporting to have been enacted to protect the public health, public morals or public safety has no real or substantial relation to those things or is a palpable invasion of rights secured by fundamental law, it is the duty of courts to so judge and thereby give effect to the Constitution."

Ex Parte Whitewell, 19 L. R. A., 729.

As bearing upon this subject and further elucidating the principles for which we contend we invite the court's attention to

In re Jacobs, 50 Am. Rep., 636.
State *vs.* Speyer, 29 L. R. A., 573.
Sutton *vs.* State, 33 L. R. A., 589.
Cotting *vs.* Kansas City S. Y. Co., 183 U. S., 79.
Connelly *vs.* Union S. P. Co., 184 U. S., 540.

In the light of these authorities we may again look at the statute in question.

"It is not *lawful* for any person * * * to herd the same (sheep) within two miles of the dwelling-house."

It will be noticed that this statute makes it unlawful to herd sheep within two miles of a dwelling-house, although the two miles may be covered entirely by range upon public lands or by lands covered by the individual who may own the sheep. The public range or the open commons may be used by all other men engaged in a similar business of stock-raising or stock-grazing and is not denied to horses or cattle. Upon what real distinction, upon what difference founded in

fact, is this discrimination based? Why is the sheep-owner denied the privilege given to every other stock-raiser? Is it because the morals, peace, or welfare of the community at large is involved, or is it but the arbitrary interference with a particular legitimate industry? Is it within the police power of the State to say that horses or cattle may come within any distance of a residence, but that it is unlawful to bring sheep within a certain distance? If so, upon what is the distinction based? As yet none has been suggested. All other stock-raisers and stockmen may use the public domain or commons, but if the sheep-owner uses it at certain places or within certain limits he is liable for damages. Suppose that the legislature had said that horses should be ostracized instead of sheep, and that their close company was no more desirable than that of sheep, would not such discrimination be equally as valid as that one in question? Does not this statute, in other words, in the language of Mr. Cooley, "provide that persons following the same specified lawful trades or employments should not have capacity to make such use of the property as was permissible to others"? All stock-raisers and all parties engaged in the stock-raising industry have the privilege and permission to use the commons except the man engaged in the stock-raising of sheep.

As we have seen by the case of Yick Wo *vs.* Hopkins, *supra*, we are permitted to consider the application and administration of the law by public authority in determining the question of whether or not it rests with unequal force or makes unjust or illegal discriminations between persons. The supreme court of Idaho, in upholding and construing this law (Sweet *vs.* Ballentyne, 8 Idaho, 431), has said that the resident may recover against the sheep-owner the value of the grass growing within two miles of his residence, although this grass may be upon public domain; that the value of this grass is an element of damage. In other words, if the sheep-owner's herd eats and destroys grass belonging to the public and growing upon the public domain and the

use of which the entire public is entitled to, the resident may recover the value thereof. But if the owner of horses or cattle permits the horses to graze upon such grass so growing upon the public domain and within two miles of the residence, no liability attaches, nor is he liable for the value thereof to any one. It is certainly clear to all that this grass does not belong to the resident or to any other particular stockman. They have no property interest in it in the sense that they may claim it to the exclusion of any one else. Yet here is a statute by which the resident may sue and recover the value of that which does not belong to him, in which he has no property interest, and to which he has a right in common with every one else. It belongs to the Government, which by license all are permitted to enjoy; yet, as the statute is now construed, the resident is given a property right therein, and as one of the unjust features of this law he may make the sheep-owner liable for the value thereof when no other citizen of the State can be made so. In other words, the man who owns sheep may go within two miles of a man's residence, cut and haul away and appropriate unto himself and feed to his sheep all the grasses if the feeding takes place more than two miles away, and the resident cannot complain and cannot recover for the value thereof. But if, instead of cutting the grass and taking it away, he takes his sheep with him and they eat it, it immediately becomes the property of the resident, and he is entitled to sue for the value thereof. Is this in any sense a police regulation? Does it have anything to do with the peace, moral quietude, and safety of the public? Is it not a fanciful discrimination upon the part of the legislature which, commencing here, may end anywhere that their curiosity may carry them in the realm of legislative fancy? "Classifications when made must be based upon some real or substantial difference which of itself naturally makes the distinction."

It was said in one of the opinions of the Supreme Court that the smell of the sheep might be offensive to some people.

True enough, and so might cologne. To carry a little further the illustration used by Justice Brewer, a black man might be offensive to some people, and thereby he might be visited in the mind of the legislature with the liability to pay an attorney fee when sued, while a white man should not be so charged. But that would hardly be such a distinction as the fundamental principles of our Government require in order that a legitimate industry may be interfered with. But suppose we admit that the smell may be offensive. Yet this ought not to carry with it the right to recover the value of the grass upon the public domain. The statute, as construed, not only says that the sheepmen may not come within two miles, but if they do come and eat the grass they are liable for the value thereof, while no one else is. It is not shown nor is it pretended that the grazing of sheep affects the health of the resident, nor does it disturb his peace or quietude.

The policy of the United States as to the public lands not only permits but encourages their use for the purpose of pasturing of all kinds of live stock. In the case below Justice Miller said:

"We are of the opinion that there is implied licence growing out of the custom of nearly a hundred years that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of Government forbids this use. * * * The Government of the United States in all its branches has known of this use and has never forbidden it or taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the Government, and as we shall attempt to show, with its direct encouragement. * * * The owner of a piece of land who had built a house or enclosed 20 or 40 acres of it had the benefit of this universal custom as well as the party who owned no land. Everybody used the open, unenclosed common which produced nutritious grasses as a public common

on which their horses, cattle, hogs and sheep could run and graze.

"It has never been understood that in those regions and in this country in the progress of its settlement the principle prevailed that a man was bound to keep his cattle confined within his own ground or else would be liable for their trespasses upon unenclosed ground of his neighbors."

Buford *vs.* Houtz, 133 U. S., 320.
Kelley *vs.* Rhoades, 188 U. S., 1.

The supreme court of Idaho has said: "The common-law rule that a man must confine his own domestic animals to his own enclosure has never obtained in this State."

Johnson *vs.* O. S. L. Ry. Co., 63 Pac., 112.

It should be borne in mind, therefore, that the stock in this country of all kinds is not upon the public domain as trespassers, but the stock is there, of whatever kind or nature, without discrimination or restriction and by reason of the positive right recognized as such by the executive, legislative, and judicial departments of the Government. All are encouraged alike and in the same measure.

Again, why this particular limit of two miles—this arbitrary fixing of a distance? Is there any reason why it should be unlawful to herd sheep within two miles and lawful to herd them two miles and a quarter? In other words, upon what does the legislature base its right to fix an arbitrary distance? Is there any distinction to be made or reason to be given why it is contrary to the morals, the peace, the health, and quietude of the community to have sheep kept at this arbitrary distance of two miles? What reason can be assigned in law or in fact, if this law is constitutional, why the legislature should not amend it and say four miles, which would practically drive sheep from the range? We are now simply discussing the power of the legislature to say two miles, for if they have that power they have the power to say four miles. "One legislative interference is but the length of a long chain of repetitions;

their subsequent interference being naturally produced by the effects of the preceding" (Federalist, No. 44). Whether the grazing of sheep in the vicinity of a man's house is injurious from a standpoint of health or sanitary or peace regulation is entirely dependent upon other questions than that of distance. As was said in the case of State *vs.* Speyer, *supra:* "It cannot be said that all pig-pens situated within one hundred feet of a well or spring of water used for drinking purposes or within one hundred feet of a store or inhabited house are injurious to public health." To illustrate: Suppose A is ranging sheep at the foot of a mountain range or high range of hills. On the opposite side dwells his neighbor. The watershed runs in an opposite direction from the watershed where the sheep graze. The neighbor's cattle are upon a different range. The sheep, therefore, so far as their effect upon the neighbor is concerned, his health, his peace of mind, do not affect him any more than if under other conditions they were ten miles away. On the other hand, if the sheep were upon the source of a stream or above the resident upon his immediate range, if they could be said to affect him at all they would do so a great deal more at a distance of five miles away than under other circumstances at a distance of two miles. This law therefore makes this distinction, which does not exist in fact and has for its basic principle a purely arbitrary and unreasonable limitation, which upon the same theory exactly might just as well be extended to four miles or any other distance. But all these matters with reference to the herding of sheep within a certain distance of a man's house must apply just the same to horses and cattle and hogs, and any law which would be good must treat every grazer, stockholder, or user of public range alike.

The objections to the validity of the law here urged were all presented for the consideration of the State court, and the State court held against the plaintiffs in error upon all these

matters. We are therefore fully within the rule and entitled to have the questions reviewed and passed upon here.

In presenting this matter in the brief we have argued the assignments of error collectively for the reason that they are closely allied and thoroughly interwoven one with another. But both in the record and in the brief we have endeavored to specify clearly and separately the different reasons why we think the law unconstitutional.

In conclusion, we urge that the statute in question, which has been sustained by the State court, deprives the plaintiffs in error of their property without due process of law; that it denies to them the equal protection of the law; that the interest which the legislature has apparently sought to protect is a private interest; that the classification which the legislature seeks to make is between kinds of property and between parties engaged in the same business between which there is no distinction in principle or no difference in fact; that the act fixes an arbitrary limit without regard to the facts or the existence of the interest to be protected or the real conditions surrounding the industries; that the State law does not operate generally in its application, nor does it embrace all persons or all classes under substantially similar circumstances; that said law attempts to create a distinction arbitrary and unfounded, and that in the interpretation of the law and in the enforcement of the same as construed by the courts it is made to affect unfairly and unequally those engaged in a legitimate business.

Respectfully submitted,

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